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No. 95-644

In The

Supreme Court of the United States

October Term, 1995

ISLAMIC REPUBLIC OF IRAN,

Petitioner,

v.

MCKESSON CORPORATION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

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REPLY BRIEF

I. RESPONDENTS' BRIEF IN OPPOSITION STRENGTHENS PETITIONER'S ARGUMENT THAT CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' INTERPRETATION OF *WELTOVER* IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS

Respondents do not dispute (Br. Op. at 6-7) that the court of appeals interpreted the "direct effect" and "immediate consequence" tests as articulated by the Court in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 617-619 (1992), as being inapplicable in this case. In the court of appeals' view those tests apply only to cases where a nonresident claimant brings suit against a foreign state for a breach of an obligation that the state undertook to perform in this country. In reliance

on that analysis, respondents urge that *Weltover* is inapposite because they make no claim that Iran defaulted on any obligation that was to be carried out in the United States (Br. Opp. at 7). Instead, they iterate that "Iran's alleged wrongful discontinuance of the flow of capital, machinery, personnel, etc., *to Pak Dairy in Iran from McKesson in the United States* was sufficient to create the requisite direct effect in the United States." (Br.Opp. at 8, emphasis in original).

Weltover's analysis of the "direct effect" clause of the commercial activity exception to sovereign immunity did not, however, focus on the claimant's nationality, nor was the Court concerned with the effect that the foreign state's commercial activities abroad might ultimately have on a corporate claimant's balance sheet. Rather, the Court focused on the nature of the defendant state's activity and whether the damages asserted by the claimant in the United States followed "as an immediate consequence of the defendant [state's] activity." 504 U.S. at 618.

Respondents do not, and cannot, dispute the accuracy of Iran's statement, fully supported by the record, that —

> . . . there was no obligation on the part of Pak Dairy to provide capital in the United States, management personnel in the United States, machinery, etc., in the United States, nor was there an obligation to pay in the United States for services that persons performed in Iran, for the use of equipment sent from the United States to Iran, or to pay dividends in the United States. Rather, dividends were paid in Iran in local currency.

Pet. at 7-8; Br.Opp. at 8.

Respondents simply claim that Iran's acts produced the requisite "direct effect" in this country because McKesson is incorporated and domiciled here.

The court of appeals' ruling conflicts with this Court's interpretation of an important federal act, the Foreign Sovereign Immunities Act of 1976. Specifically, whether an American national who brings suit against a foreign state under the commercial activity exception to sovereign immunity for a commercial tort alleged to have been committed by the state abroad satisfies the "direct effect" requirement of §1605(a)(2) without a showing that the foreign state had assumed an obligation to perform some act in the United States in relation to its commercial activity elsewhere. For the reasons already given, Pet. at 10-11, Iran believes that the direct effect clause of §1605(a)(2), as interpreted in *Weltover*, requires a showing that the foreign state assumed an obligation to perform some act in the United States, in most cases, to pay in the United States.

Respondents' attempt to square the circuit court decisions relied on by Iran (Pet. at 11-12) with their misinterpretation of *Weltover* is unconvincing. If the non-receipt in this case of dividends in the United States that were contractually payable only in Iran establishes the requisite "direct effect," the Tenth Circuit must have been wrong when it ruled in *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232 (10th Cir. 1994) that the non-receipt in the United States of the large sums of money that were payable in Paris or London did not create a direct effect here. Similarly, once it had been established in *Gregorian v. Izvestia*, 871 F.2d 1515, 1527 (9th Cir. 1989), that the American plaintiff had failed to receive payment in the United States, the Ninth Circuit's remand for discovery whether the contract with the Soviet trade agency did in fact require payment in the United States was plainly unnecessary.

Both *Mangyshlakneft* and *Gregorian* were cases where the American plaintiffs claimed injury as a result of their non-receipt of payment in the United States. *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1385-1386 (8th Cir. 1993), and

Antares Aircraft v. Federal Republic of Nigeria, 948 F.2d 90 (2d Cir. 1991), *vacated and remanded for further consideration in light of Weltover*, 120 L.Ed.2d 892 (1992), *aff'd on remand*, 999 F.2d 33 (2d Cir. 1993), *cert. denied*, 127 L.Ed.2d 74 (1994), illustrate the other typical problem, where plaintiffs were required to pay out money abroad. Although there the funds flowed in the other direction, the effect on the American plaintiffs' balance sheet was the same. Nevertheless, the Eighth Circuit in *Grossman* declined to find a direct effect on the American plaintiff although, according to the complaint, the foreign state's actions had wrongfully caused the American plaintiff to lose large sums of money transferred abroad.

In *Antares*, the Second Circuit found that the alleged actions of the foreign state in wrongfully compelling an American partnership to disburse $100,000 abroad was insufficient to establish a direct effect in the United States despite the obvious negative impact on the plaintiff's balance sheet. 999 F.2d at 36-37. As respondents accurately point out (Br.Opp. at 10), the Second Circuit noted that there was no showing that the aircraft in question was used in commerce with the United States; that, however, was not the dispositive issue and the issue on which the majority and the dissent disagreed. The dispositive issue was whether a financial loss to the American entity, without further connection to the United States, was sufficient to establish a direct effect as defined by this Court in *Weltover*. The majority, consistent with Iran's position here, held that a showing of a mere financial loss in the United States was insufficient. 999 F.2d at 36-37. Consistent with respondents' position, Judge Altimari's dissent expressed the view that financial loss was enough. 999 F.2d at 37.

Only one of the two cases relied on by respondents — a district court case — conflicts with the circuit court decisions that have applied the "direct effect" test since *Weltover* (pet. at 7). In *Ampac Group, Inc. v. Republic of Honduras*,

797 F.Supp. 973, 977 (S.D.Fla. 1992), *aff'd without opinion*, 40 F.3d 389 (11th Cir. 1994), the district court interpreted *Weltover* to require only economic loss to a corporation in the United States to establish a direct effect. Contrary to respondents' view, *Walter Fuller Aircraft Sales v. Rep. of Philippines*, 965 F.2d 1375 (5th Cir. 1992) (Br.Opp. at 11), is not contrary to *Weltover*. There, the Fifth Circuit found a direct effect in the United States under the immediate consequence test because, even though the Philippine government entity involved was contractually obligated to defend Fuller in courts world-wide, it had specifically failed to fulfill its obligation in the United States. *Id.*, at 1378, 1387.

Thus, respondents' brief in opposition essentially confirms that the court of appeals' decision below is in direct conflict with those of at least five other Circuits. Respondents' suggestion that the conflict is not so apparent on the face of the court of appeals' decision as to justify certiorari, sounds hollow: (1) respondents' own brief establishes that the misinterpretation of *Weltover* adopted below has also found favor with one dissenting Circuit Judge in another circuit, and one district court decision in a third; (2) the assumption of jurisdiction over a foreign state in what is essentially an expropriation case, presented in the guise of a commercial dispute is likely to have serious foreign policy implication to which this Court has been traditionally sensitive (see Pet. at 13-15);[1] and (3) this Court should not sanction the application of one type of "direct effect" test to foreign states generally and a more intrusive test for petitioner (*id*,).

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[1]Expropriation is expressly addressed in §1605(a)(3) of the FSIA. The instant suit is an effort to circumvent that section by reading into the commercial activity exception in §1605(a)(2) a novel jurisdictional basis for expropriations on the theory that they have a financial effect in the United States. It is almost trite to observe that *any* expropriation of American property will have a financial effect in the United States.

II. IRAN HAS NOT WAIVED ITS RIGHTS UNDER THE INVESTMENT GUARANTY AGREEMENT

Respondents argue that Iran has waived its rights under the Investment Guaranty Agreement[2] because Iran has not demanded arbitration since the dispute arose in 1979-1981. To begin with, respondents plainly misconstrue Iran's submission. The Agreement is raised not for the purpose of demanding arbitration of OPIC's claim, but as a separate and independent showing that U.S. courts lack subject-matter jurisdiction to hear OPIC's claim due to a preexisting international agreement.[3] As a result of the subrogation of the claim by OPIC, the dispute has become an inter-governmental dispute beteween Iran and the United States by virtue of the Agreement, and can no longer be litigated in the domestic courts of either State.

Second, the circumstance that Iran has not demanded arbitration has not vested U.S. courts with subject-matter jurisdiction over OPIC's claim. Under the Agreement, Iran had no obligation to demand arbitration. Since it is the United States that claims to be aggrieved, the United States was free to request negotiation or arbitration with Iran at any time. The Agreement, however, did not provide the United States with an alternative forum if Iran did not make the first move.

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[2]Agreement Between the United States and Iran on Guarantee of Private Investments, T.I.A.S. No. 3913, 8 U.S.T. 1599 (1957).

[3]§1604 of the FSIA denies competence to U.S. courts to hear claims against foreign states that are governed by "existing international agreements to which the United States is a party at the time of the enactment of this Act [1976]." Respondents do not take issue with petitioner's showing that the Investment Guarantee Agreement is a supervening international agreement under §1604 of the FSIA, and that therefore an issue granting subject matter jurisdiction has been presented that can be raised at any time. Br.Opp. at 13-14.

Third, the Agreement between the two governments comprises an international agreement that is governed by the rules of international law. Therefore, it is these rules, not U.S. domestic law, that determine whether Iran has waived its rights under the Agreement.

Finally, respondents can derive no comfort from the cases cited by them, since they fully support Iran's position. *Cabinetree of Wis. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390-91 (7th Cir. 1995) (election to proceed before nonarbitral tribunal for resolution of contractual dispute is presumptive waiver of right to arbitrate). Here, Iran did not elect to submit the merits of OPIC's claim for adjudication by U.S. courts; on the contrary, it has vigorously challenged from the inception of this suit the district court's lack of personal and subject-matter jurisdiction. See also *Com-Tech Associates v. Computer Associates Intern.*, 938 F.2d 1547, 1576 (2d Cir. 1991) (litigation of substantial issues *going to the merits* may constitute a waiver of arbitration); *Stone v. E.F. Hutton, Co., Inc.*, 898 F.2d 1542, 1544 (11th Cir. 1990) (same); *Peterson v. Shearson/American Express, Inc.* 849 F.2d 464, 467-68 (10th Cir. 1988) (same); *Nat. Foun. for Cancer Res. v. A.G. Edwards & Sons*, 821 F.2d 772 (D.C. Cir. 1987) (same).

CONCLUSION

For the foregoing reasons, and the reasons set forth in Iran's petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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